

JUL 25 1967

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN LUSTIGER,)
Appellant,)
vs.)
UNITED STATES OF AMERICA,)
Appellee.)

NO. 20967

On appeal From the Judgment of
The United States District Court
For the District of Arizona

* * * * *

SUPPLEMENTAL BRIEF FOR APPELLEE
ON SUFFICIENCY OF EVIDENCE

* * * * *

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FILED

JUL 17 1967

WM. B. LUCK, CLERK

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This Supplemental Brief on the Sufficiency of the Evidence is submitted pursuant to the Order entered on July 3, 1967 at oral argument before Chief Judge Richard H. Chambers, Judge Frederick G. Hamley and Judge Walter Ely.

A discussion of cases cited by Appellant in his opening brief on the sufficiency of the evidence is on pages 36-39 of

Appellee's brief, as well as cases cited by Appellee in support of its position.

In Appellant's reply brief, Appellant states that a portion of paragraph 7 of the Indictment is "puffing or seller's talk", and cites the following cases in support of this:

United States v. Rabinowitz, (6th Cir., 1964), 327 F.2d 62, which involved the sale of knitting machines; contacts to sell the knitting machines were made through the mails, but the machines were sold only after the prospective buyer was visited by a salesman and had the machine demonstrated to him.

United States v. Staples, (D.Ct., W.D. Mich., 1890), 45 Fed. 195, involved a defendant who advertised seed wheat for sale but who did not send it when the money was received, and who also advertised blueberry plants for sale but sent buyers wild huckleberry plants. The Court, in its charge, asked the jury to decide if it was puffing as to value and the exaggerations of normal business or was it actually fraudulent representation or downright deception.

Faulkner v. United States, (5th Cir., 1907), 157 Fed. 840, involved the advertising of a cold storage plant, including the satisfaction of customers. The proof offered was that he didn't pay off all claims, but he did pay most of the claims.

There was no falseness shown in the facilities of the cold storage plant.

This Circuit held in Lemon v. United States, (9th Cir., 1960), 278 F.2d 369, at page 373: "No actual misrepresentation of fact is necessary to make the crime complete." In fact, ". . . the lack of guile on the part of those solicited may itself point with persuasion to the fraudulent character of the artifice."

In Appellant's reply brief, Appellant states the Government must show someone was defrauded and cites two cases in support of this - - a Sixth Circuit case and a Seventh Circuit case:

United States v. Rabinowitz, *supra*, (see discussion *supra*).

Milter v. United States, (7th Cir., 1909), 174 Fed. 35, which involved a scheme to sell shares of stock by offering certain jobs as managers of branch offices they wanted to establish. The Indictment did not allege the shares of stock were not worth the price paid.

The rule in the Ninth Circuit is, as was stated in Farrell v. United States, (9th Cir., 1963), 321 F.2d 409, at page 419, citing Fourth and Ninth Circuit cases, that the Government is not required to prove that someone sustained a loss.

Also please see Pereira v. United States, (1953), 347 U.S. 1, at page 8, 74 S.Ct. 358, 98 L.Ed. 435, and United States v. New South Farm & Home Co., (1916), 241 U.S. 64, at page 71, 36 S.Ct. 505.

The rule on the construction of evidence on appeal in this Circuit is set out in Kaplan v. United States, (9th Cir., 1964), 329 F.2d 561. Also, Mickelson v. United States, (9th Cir., 1965), 346 F.2d 952, at 954.

The evidence offered at trial will be discussed in relation to the allegations of the Indictment.

Paragraph 1 alleges the Appellant, Marvin Lustiger, devised and intended to devise a scheme and artifice to defraud and for obtaining money by means of false and fraudulent representations and promises from numerous persons scattered throughout the United States, and lists forty-seven people, but not limited to them as people intended to be defrauded, by means of false and fraudulent devices, pretenses, representations and promises to purchase lots in that subdivision known as Lake Mead City, in Mohave County, Arizona. (The list of forty-seven people Postal Inspector Marshall had prior to the inspection of the corporation's books, and they were found to be included in the corporation's books. RT 398, L 10-21).

Paragraph 2 of the Indictment alleges the organization of Lake Mead Land and Water Company, an Arizona corporation, on September 7, 1960, by the Appellant, who was an officer and director thereof, and caused it to transact business in Arizona. (Government's Exhibit 20 which consists of the Certificate and Articles of Incorporation, and the annual report listing the officers and directors. See also Paragraphs 1, 2, 3, 4, 5 and 6 of Government's Exhibit 58).

Paragraph 3 of the Indictment alleges:

"3. It was a further part of said scheme and artifice to defraud that the defendant would and did represent to said persons intended to be defrauded, and pretend by using the address of Post Office Box 13349, Phoenix, Arizona, as the mailing address of Lake Mead Land and Water Co., that the said Lake Mead Land and Water Co. operated from headquarters at Phoenix, Arizona, whereas, in truth and in fact, as the defendant well knew at the time, the aforesaid pretense and representation were misleading, deceptive and false when made."

This was established by the testimony of Juanita Tincher Ley (RT 78-84), Government's Exhibit 21, which is the application for Box 13349 in Phoenix, Arizona, and Postal Inspector D. C. Marshall's interview of Marvin Lustiger on November 10, 1962, (RT 358, and 362, L 3-11), which showed that Lake Mead

Land and Water Co. did not have headquarters or an operating business office at Phoenix, Arizona; the principal business of Lake Mead Land and Water Co. was handled from 236 East Foothill in Azusa, California; mail for Lake Mead Land and Water Co. delivered to Post Office Box 13349 at Phoenix, Arizona, was picked up by Juanita Tincher Ley and forwarded to 236 East Foothill, Azusa, California, for opening and processing; and correspondence of Lake Mead Land and Water Co. directed to the persons intended to be defrauded was prepared at Azusa, California, and mailed under cover to Lake Mead Land and Water Co. at Post Office Box 13349, Phoenix, Arizona, for re-mailing at Phoenix, Arizona, by the hired representative of Lake Mead Land and Water Co. so that mailings made by Lake Mead Land and Water Co. to the persons intended to be defrauded would be postmarked at Phoenix, Arizona.

Paragraphs 4, 5 and 6 of the Indictment alleged the offering for sale of the lots in Lake Mead City through advertisements in newspapers, magazines and publications throughout the United States on a time payment plan.

See Exhibit 27 for the number of Sections. The Appellant advertised in publications whose total circulation had national coverage (Government's Exhibits 36 and 36a).

Over 3000 lots were sold under contract (see Government's Exhibit 44) of a total of over 6800 lots in twenty

sections scattered over five townships (see Government's Exhibit 26). See Exhibit 44 listing the contracts for payment.

Paragraph 7 of the Indictment alleged as follows:

"7. It was a furtherpart of said scheme and artifice to defraud that the defendant would and did, for the purpose of inducing said persons intended to be defrauded to purchase lots or parcels or contract for the purchase of lots or parcels in the said Lake Mead City subdivision units, send and cause to be sent by the United States mails to said persons intended to be defrauded advertising brochures or booklets published by Lake Mead Land and Water Co., and entitled 'Join Us for Pleasure and Profit at Lake Mead City, Arizona,' which said advertising brochures or booklets contained the misleading, deceptive, false and fraudulent pretenses, representations and promises herein-after described as follows, well knowing at the time that said pretenses, representations and promises would be and were misleading, deceptive, false and fraudulent when made:

"(a) 'Join us for Pleasure and Profit at Lake Mead City, Arizona'" (On cover page of Government's Exhibits 37a through 37f).

"(b) 'Lake Mead City...an enchanted city in the

making, a truly outstanding New Frontier for wise investors.'" (Page 4 of Government's Exhibits 37d, 37e, 37f).

"(c) 'Lake Mead City. Arizona's best located planned community.'" (Page 4 of Government's Exhibits 37a, 37b, 37c).

"(d) 'Invest in this booming area now.'" (Page 9 of Government's Exhibits 37a, 37b, 37c).

"(e) 'Lake Mead City planning and restrictions assure you of properties that will always be favorably looked upon by discriminating purchasers.'" (Page 4 of Government's Exhibits 37d, 37e, 37f).

"(f) 'Now, for only pennies a day, you can participate in one of the best planned and fastest selling resort areas in Arizona.'" (Page 3 of Government's Exhibits 37a through 37f).

The use of the words "Lake Mead City" in the subdivision name and the phrases "as activity increases," "as the community progresses," "an enchanted city in the making," "Arizona's best located planned community," "best planned," and "community development," frequently repeated in the said advertising, were intended to cause the persons intended to be defrauded to believe that a city or community of residents, planned by Lake Mead Land and Water Co., was

already started and rapidly growing and that its future continued rapid development and growth were assured by the plans being executed and put into effect by Lake Mead Land and Water Co., whereas no city or community of residents or building improvements of any kind existed then and up to March, 1963 did exist on any of the said Lake Mead City subdivision units, except for the small office building used as a field office by Lake Mead Land and Water Co. and a temporary type dwelling occupied by the caretaker and guide employed by Lake Mead Land and Water Co., which are situated on subdivision unit 23-29-17. In Paragraph 37 of Stipulation No. 3, at RC 204, are listed five houses, some of which were begun in March, 1963 and one was completed in 1965, which at the time of trial were all that existed on Lake Mead City. Needless to say, Lake Mead City never was incorporated as a city or town - - see Stipulation, Paragraph E of Government's Exhibit 116.

Lake Mead Land and Water Co. did not intend to construct or provide housing or shopping facilities or provide the utilities necessary to the development of a city or sizeable community of residents on said Lake Mead City subdivision units, and there was no assurance that a city would ever develop thereon; that there would be any community development or that activity would ever increase on the said

Lake Mead City subdivisions, except for the possible installation by Lake Mead Land and Water Co. of additional rough dirt streets, street signs, lot stakes and identification markers, which activity has not as yet resulted in any permanent occupants locating in any of the said subdivision units, and there is no assurance that it ever will. (See Lustiger's interview by Postal Inspector Marshall at RT 365 to 366, L 16).

Whether a city or community of residents will ever develop on the said Lake Mead City subdivisions is wholly dependent on whether persons who purchase lots therein will ever occupy the property and provide the housing, utilities, shopping facilities and other facilities and conveniences necessary to the growth and development of a city or community, at their own expense, which is unlikely because of the remoteness of the location from existing utility services, the scattered checkerboard pattern of the subdivision units, with grazing land interspersed, and the inaccessibility of the said subdivision units by ordinary motor vehicle. (See Government's Exhibit 58, Paragraphs 20, 21, 22, 23 and 24).

Lake Mead City is not Arizona's best located or best planned community or one of the best planned resort areas in Arizona and Lake Mead City planning and restrictions do not assure purchasers of lots in the said Lake Mead City subdivisions of properties that will always be favorably looked upon

by discriminating purchasers. In truth and in fact, the lack of proper planning for community development purposes prohibits the probability or possibility of a city or orderly community ever developing on the said subdivision units, for the following reasons:

Said subdivision units comprise only odd-numbered sections of land widely scattered geographically in five different townships, in which said townships the even-numbered sections are owned by the Federal Government and subject to use for grazing purposes. (See Government's Exhibit 27).

Some of the said subdivision units are separated from others by a high mountain and deep natural drainage wash, it being a distance of approximately 28 miles between some of the said units by existing roads and jeep trails not traversable with an ordinary automobile.

Most of the said subdivision units are not accessible by ordinary motor vehicle because of the lack of passable roads, and there are numerous rocky hills and unbridged deep washes thereon. (See map, Exhibit 27 and photographs, Exhibits 108, 109, 110, 111, 112 and Doyle Marshall's description of the 1000 foot high Grand Wash Cliffs - RT 378 and 388).

"(g) 'When subdivision takes place, in choice locations such as Lake Mead City, history shows land values rise rapidly.'" (Page 3 of Government's Exhibits 37d, 37e, 37f).

"(h) 'When development takes place, such as in Lake Mead City, history shows that land values rise rapidly.'" (Page 3 of Government's Exhibits 37a, 37b, 37c).

"(i) 'Seldom, if ever, will you find it possible to purchase so much good land for such a low price.'" (Page 3, Exhibits 37a through 37f).

"(j) 'You can be a property owner of land that is considered among the finest ever offered for sale in the State of Arizona.'" (Page 5 of Exhibits 37a, 37b, 37c and 37d, 37e, 37f).

"(k) 'The best located resort property in the West.'" (Page 9 of Government's Exhibits 37a, 37b, 37c and 37d, 37e, 37f).

"(l) 'Location more than any other factor, determines land values. Lake Mead City enjoys a superb, unique location. Lake Mead City is the only nationally advertised major project of its type, actually starting within the Lake Mead National Recreation Area. Most of the property in this area is Federal Land and is not available at any price. This tends to push prices higher and higher for the choice, privately-owned,

deeded properties in Lake Mead City. Get yours now!'" (Page 8 of Exhibits 37d, 37e, 37f).

"(m) 'Most of the region shown on this map consists of Federal land, and is not available at any price. This makes the choice privately-owned, deeded properties in Lake Mead City all the more valuable, and future price increases seem well-assured.'"

(Page 16 of Exhibit 37d, 37e, 37f).

"(n) 'Land values in the Lake Mead City area have increased over 50% in the last few months, as subdivision has progressed, yet you may still acquire a large estate for cigarette or coffee money. Act now, while you can still buy at original subdivider's prices. Watch land values increase as activity heightens.'"

(Page 17 of Exhibits 37d, 37e, 37f).

"(o) 'Land values in Lake Mead City have increased over 50% in the last few months, as development has progressed, yet you may still acquire a large estate for cigarette or coffee money. Act now! Watch land values increase as development continues.''" (Page 17 of Exhibits 37a, 37b, 37c).

"(p) 'Thousands of wise investors have already decided that our special offering represents a worthwhile

holding, for future profit. Substantial price boosts are indicated as the nationwide demand increases for this choice private property.''" (Page 31 of Exhibits 37d, 37e, 37f).

The Lake Mead City subdivision properties are not choice land, in a choice location, an American paradise, the best located resort property in the west, or among the finest properties ever offered for sale in the State of Arizona, for the following reasons:

The said subdivision properties are remote from existing highways, the nearest of said subdivision units being approximately 40 miles distant from U. S. Highway 66 and approximately 30 miles distant from U. S. Highway 93, and the farthest of said subdivision units being approximately 54 miles distant from U. S. Highway 66 and approximately 44 miles distant from U.S. Highway 93, the nearest hard surfaced highways. (Marshall's testimony, RT 392-393).

The nearest of said subdivision units is approximately 23 miles and the farthest of said subdivision units is approximately 38 miles distant from the nearest existing electric power and telephone lines. (Marshall's testimony, RT 393).

Most of the said subdivision units are not accessible by ordinary motor vehicle because of lack of passable roads. (Marshall's testimony, RT 376).

Streets for access to lots, street signs, lot stakes or identification markers have not been provided in 19 of the 20 existing subdivision units. (Marshall's testimony, RT 365, lines 1 and 2).

Most of the said subdivision units have numerous rocky hills and unbridged natural drainage washes thereon, making considerable portions of said subdivision units undesirable and costly to utilize for residential purposes. (For example, take the aerial photographs, Exhibit 55 Series (which have the sections written on the reverse side) and the corresponding plat in the Exhibit 28 Series and see how there is no adaptation of the plot plan to the terrain).

The only assured source of potable water supply available to purchasers of lots in said Lake Mead City subdivision up to the date of the Indictment was from a windmill operated well located in subdivision unit 7-30-16, from which well lot owners would have to haul water at their own expense and provide storage facilities on their lots at their own expense, said well being a distance of 28 or more miles from some of the said subdivision units, with only jeep trails for access to said units. (Lustiger's interview, RT 366, L 1-11, and see maps, Exhibits 22 and 27).

The said subdivisions are located on odd-numbered sections of land, widely scattered geographically in five

different townships, in which townships the even-numbered sections of land are owned by the Federal Government and subject to use for grazing purposes. (Government's Exhibits 22 and 27).

The mere fact of subdividing of a property, without occupancy by tenants and provision of utilities, adequately maintained streets, shopping and other facilities necessary for growth of a community, none of which has occurred on the said Lake Mead City subdivisions, does not insure or even make probable a rise in land values.

Land values in the said Lake Mead City subdivisions did not increase by 50% as a result of progression of said subdivision activities, during a few months, or at any time since said subdivision took place. Because of the improbability of an orderly residential community ever developing on these widely scattered, inaccessible properties on rough terrain, increases in values of said properties are not assured or even likely and it is improbable that purchasers of 1-1/4 acre lots in said subdivisions will ever be able to subdivide said 1-1/4 acre lots into four smaller parcels and sell each of said smaller parcels for more than they paid Lake Mead Land and Water Co. for said 1-1/4 acre lots.

Any price increases which have occurred since subdivision of the said land have been arbitrarily made by Lake

Mead Land and Water Co. and were not the result of increased community development, occupancy or other activity in said subdivisions.

Thousands of wise investors have not already decided that the special offering of lots in the said Lake Mead City subdivisions represents a worthwhile holding for future profit, except by having been so convinced by the false representations of Lake Mead Land and Water Co. as to the values of said properties and assurance of increased values in the future predicated upon the development of a city or living community, which has not materialized. (To the contrary were Col. Davidson, who based his opinion on the fact that taxes had risen on other land he owned in Mohave County, RT 433, L 14-18; and Betty Russell, who didn't see the land she bought through the mail and traded it for land in the building area when she got there, believed the land had risen in value, RT 557-558 and 563). These were the only two of eleven purchaser witnesses for the defense who had opinions as to value.

"(q) 'Arizona's best located, best planned resort area, convenient to both year 'round water sports at Lake Mead and the majestic beauty of the Grand Canyon.'"
(Page 4 of Government's Exhibits 37a, 37b, 37c, and 37d, 37e, 37f).

"(r) 'Less than 5 miles from the lake.'"
(Page

17 of Government's Exhibits 37a, 37b, 37c and 37d, 37e, 37f).

"(s) 'Lake Mead City actually begins less than 5 miles from the lake.'" (Page 9 of Government's Exhibits 37d, 37e, 37f).

"(t) 'Lake Mead City begins less than 5 miles from the lake.'" (Page 8 of Government's Exhibits 37a, 37b, 37c).

"(u) 'Lake Mead City nests in the center of hugh recreational developments. Properties are located within a beautiful Joshua tree forest, and in the heart of the Lake Mead National Recreational Area.'" (Page 9 of Government's Exhibits 37a, 37b, 37c, and 37d, 37e, 37f).

"(v) 'These estates nest in the center of the West's greatest recreational facilities.'" (Page 16 of Government's Exhibits 37a, 37b, 37c, and 37d, 37e, 37f).

"(w) 'Here is your once-in-a-lifetime opportunity to become a land owner of estate-size property in the heart of one of the West's largest recreational areas.'" (Page 5 of Government's Exhibits 37a, 37b, 37c).

While one or more of said Lake Mead City subdivision units are within approximately five miles by a straight line from the nearest point on Lake Mead, the distance by the only existing road to Pierce Ferry boat landing on Lake Mead, which is the nearest point on the said lake to said Lake Mead City subdivision units, is approximately 15 miles distant from the nearest and approximately 40 miles distant from the farthest of said subdivision units, and most of said subdivision units cannot be traveled to or from in any ordinary motor vehicle because there are only jeep roads or trails thereto. (See Marshall's testimony, RT 392 and 376).

The Lake Mead City subdivision units are not located in the center or heart of the Lake Mead Recreational Area, but, in fact, are located on the far eastern extremity of said recreational area and are considerably more difficult of access than the more visited and developed places in that recreational area which are in the vicinities of the Boulder, Davis and Parker Dams, accessible by hard surfaced roads. (See maps, Government's Exhibits 22 and 27).

Many, and in fact most, of the Lake Mead City subdivision units are not convenient to water sports at Lake Mead because they are from 20 to 40 miles distant from the nearest accessible point on said Lake and most of said subdivision units are not accessible by motor vehicle. (See testimony of

Marshall, RT 392-401, and maps, Exhibits 22 and 27).

"(x) 'County roads have existed in Lake Mead City for several years, and are maintained by the county.'" (Page 8 of Government's Exhibits 37d, 37e, 37f).

"(y) 'County roads have existed in Lake Mead City for several years and are maintained in proper condition at all times.'" (Page 8 of Exhibits 37a, 37b, 37c).

"(z) 'Lake Mead City is easily reached, with access via U.S. Highways and County Roads. An air-field and a boat anchorage are nearby.'" (Page 16 of Government's Exhibits 37a, 37b, 37c).

They do not disclose the pertinent fact that most of the said Lake Mead City subdivision units are not adjacent to said existing county roads and there are only jeep trails by which many of said subdivision units can be reached and no roads or trails at all to some of the said subdivision units. (RT 392-401; see also the Christiansen testimony concerning the plausibility of roads being cut through some of the sections as dedicated, hills too steep for straight roads, etc. - RT 330-335).

"(aa) 'Modern schools, churches and shopping facilities in nearby Kingman, the county seat.'" (Page 5

of Exhibits 37a, 37b, 37c, and 37d, 37e, 37f).

It does not disclose the material fact that Kingman, Arizona, is approximately 60 miles via existing roads from the nearest of said Lake Mead City subdivision units and as much as 75 miles from some of said subdivision units. (This does appear in the second version of the fact sheet - see 39a; the time of issue of this was not established - it was the second version of the fact sheet, however).

"(bb) 'All our properties are within the franchised area of Citizen's Utilities Company, with regard to power and telephone.'" (Page 21 of Exhibits 37d, 37e, 37f).

It fails to disclose and conceals the true and material fact that the nearest existing electric power lines and telephone lines are approximately 23 miles from the nearest and approximately 38 miles from the farthest of said Lake Mead City subdivision units; that Lake Mead Land and Water Co. will not pay the cost of bringing electric power or telephone lines to any of the said subdivision units; and that any lot owner in said subdivision units desiring electricity or telephone service at any of said lots before existence of a community of residents of sufficient size to make extension of said power or telephone lines to said subdivision units at the expense of the utility companies feasible, could obtain electric

power or telephone service only by paying the full cost of extension of said lines to said lot or lots. (RT 392-393).

"(cc) 'IMPORTANT! Plenty of water.'" (Page 21 of Exhibits 37a, 37b, 37c and 37d, 37e, 37f).

It conceals and fails to disclose the material fact that the only assured source of potable water supply available to purchasers of lots in the said Lake Mead City subdivision units up to the return of the Indictment was from a windmill operated well located on subdivision unit 7-30-16, which is a distance of approximately 28 miles from some of said subdivision units; that said lot owners would have to haul their water from said source and provide storage facilities at their lots at their own expense, and that most of the said subdivision units are not accessible by ordinary motor vehicle.

"(dd) 'All our units have been surveyed, subdivided, platted and recorded. All road easements are provided to assure you of access.'" (Page 32 of Exhibits 37d, 37e, 37f).

"(ee) 'All parcels have been platted and recorded, with road easements laid out to assure you of access.'" (Page 30 of Exhibits 37a, 37b, 37c).

They withhold and do not disclose the material true fact that streets have been provided in only one of the twenty

(20) existing said Lake Mead City subdivision units, and many of said subdivision units are not accessible by ordinary motor vehicle, nor could lots be located if the subdivision units were accessible as no street or lot markers exist within the said subdivision units, consequently the laying out or providing of road easements does not assure lot purchasers of access to their lots as represented.

Paragraph 8 of the Indictment alleged, omitting the formal allegations, that Lustiger represented through photographs in the brochure (Exhibits 37a, 37b, 37c and 37d, 37e, 37f) that "houses already existed on the said Lake Mead City subdivisions and that water for drinking, boating, water-skiing, fishing and swimming sports was abundant on said Lake Mead City subdivisions, by means of photographs and misleading and false statements concerning said photographs appearing in the aforementioned advertising brochures of Lake Mead Land and Water Co. which were mailed to the persons intended to be defrauded, and by means of vicinity maps of the said Lake Mead City subdivisions mailed by Lake Mead Land and Water Co. to said persons intended to be defrauded, well knowing at the time that said photographs and statements concerning said photographs and said vicinity maps would be and were misleading and false when made and published, which said photographs, statements and vicinity maps are described more particularly hereinafter as follows:

"(a) A photograph of a water pond with the caption 'favorite swimming hole' thereunder, on page 25 of said brochures." (Exhibits 37a, 37b, 37c and 37d, 37e, 37f).

"(b) A picture of a house with the caption 'and comfortable ranchhouse' thereunder, on page 25 of said brochures." (Exhibits 37a, 37b, 37c and 37d, 37e, 37f).

"(c) The statement at the bottom of page 25 of said brochures: 'The above scenes were all photographed within the boundaries of Lake Mead City... a wonderful place to enjoy life.''" (Exhibits 37d, 37e, 37f).

"(d) Six lake scenes appearing on page 29 of said brochures, with the statement thereunder: 'This brochure contains pictures of portions of booming Arizona, including a large group of actual photographs of scenes at Lake Mead City, and the adjoining Lake Mead National Recreation Area, part of which is included within Lake Mead City.''" (Exhibits 37a, 37b, 37c and 37d, 37e, 37f).

"(e) Two photographs of water ponds appearing on page 21 of said brochures, on which page appears the declaration in bold print: 'IMPORTANT! Plenty

of water...,' and the statement on page 24 of said brochures that all pictures on page 21 were actually photographed within the boundaries of Lake Mead City." (Exhibits 37d, 37e, 37f).

"(f) A photograph showing a lake in the background, appearing on page 9 of said brochures, and the statement appearing below said photograph that 'Lake Mead City begins less than 5 miles from the lake.'" (Exhibits 37d, 37e, 37f).

"(g) A vicinity map of the Lake Mead City area showing thereon two wells, three springs and a water pipe line." (Exhibit 38a or 38b).

None of the aforesaid photographs show houses or bodies of water located on any of the Lake Mead City subdivision units or on any property owned by Lake Mead Land and Water Co. or which Lake Mead Land and Water Co. has options or agreements to purchase.

While one or more of the said Lake Mead City subdivision units are within approximately five miles by a straight line from the nearest point on Lake Mead, the distance by the only existing road to Pierce Ferry boat landing on Lake Mead, the nearest point on said lake accessible by motor vehicle, is approximately 15 miles from the nearest and approximately 40 miles from the farthest of said Lake Mead City subdivision

units, and most of said subdivision units are not accessible by ordinary motor vehicle because there are no passable roads thereto.

The only one of the springs or wells shown on the vicinity map depicting the Lake Mead City Area, located on any of the Lake Mead City subdivision units or on any property which Lake Mead Land and Water Co. owns or has options to purchase, is the clearwater well, located in subdivision unit 7-30-16, and neither Lake Mead Land and Water Co. nor any of the persons who purchase lots in the said Lake Mead City subdivisions have any rights to the use of water from the water pipe line or any of the other wells or springs shown on said vicinity map. (Lustiger's interview, RT 365, L 23 to 366, L 11).

The vicinity maps, Exhibits 38, 38b, 38c, which went through three printings, do not point out the sections owned or under option by Lustiger. If the eleven sections from which lots were sold were marked they would not make even a checker-board pattern.

Paragraph 9 of the Indictment alleged:

"9. It was a further part of said scheme and artifice to defraud that the defendant would and did represent to the persons intended to be defrauded who purchased lots or parcels in the said

Lake Mead City subdivisions, by means of memorandums attached to plat maps mailed to said persons, that special care had been taken to select for them lots in the choicest areas or choice areas, or near the Pierce Ferry highway, well knowing at the time that the aforesaid representations were false and fraudulent when made."

The aforesaid representations were deceptive and false when made, in that said locations were not choice or the choicest locations available at the time in said Lake Mead City subdivisions, for the reasons that the lots selected were located in subdivision units not accessible by ordinary automobile, and in which streets, street signs, lot stakes or lot identification markers have not been provided; whereas lots in subdivision unit 23-29-17, the only unit in the said Lake Mead City subdivisions in which streets, street signs, lot stakes and lot identification markers have been provided, and which said subdivision unit is adjacent to the Pierce Ferry Road, have not been selected for said purchasers, but have been held in reserve for trading to lot purchasers who complain about the inaccessibility or lack of streets, street signs, lot stakes and lot identification markers in the said subdivision units in which they purchased lots selected for them by Lake Mead Land and Water Co.

(Lustiger's interview, RT 369, L 3-15).

Paragraph 10 of the Indictment alleged, omitting the formal parts, that Lustiger did, "for the purpose of inducing the persons intended to be defrauded to purchase lots or parcels or additional lots or parcels in the said Lake Mead City subdivisions, without delay and without taking time to inspect the property before purchase, represent to said persons by means of price lists, special offering circulars and advertising mailed to said persons that the prices of lots or parcels in the said Lake Mead City subdivisions would be increased soon because of the rapidly increasing values in the area, that there were but few remaining lots in choice areas and unless said persons intended to be defrauded purchased lots or parcels or additional lots or parcels immediately, they would never again be able to purchase property in the said Lake Mead City subdivision at the price at which said properties were then being offered; whereas, in truth and in fact, as the defendant well knew at that time, the aforesaid representations were deceptive and false, in that properties in the said Lake Mead City subdivisions were not rapidly increasing in value and price increases would be and were arbitrarily made by Lake Mead Land and Water Co."

(See Government's Exhibit 40k, and Exhibits 40, 40a, 40b, 40c, 40e, 40i). There were no improvements added up to

the time of the Indictment, nor were all the lots almost sold in the "choice areas" (see Exhibit 26 showing the number of lots available).

Paragraph 11 of the Indictment alleges:

"11. It was a further part of said scheme and artifice to defraud that the defendant would and did, for the purpose of inducing the persons intended to be defrauded to purchase lots or parcels in the said Lake Mead City subdivisions, knowingly and wilfully conceal from said persons intended to be defrauded material facts affecting the present and probable future value of properties in said Lake Mead City subdivisions and the usability of said properties for residential purposes, by withholding from and not clearly revealing in their advertising said material facts, among which are the following:

"(a) The said Lake Mead City subdivision units all are located on odd-numbered sections of land, widely scattered geographically in five different townships, in which townships the even-numbered sections of land are owned by the Federal Government and subject to use for grazing purposes." (See Exhibit 26 for list of sections owned and optioned by Lustiger listing the eleven (11) from which he sold lots; then

mark these eleven sections on Exhibit 38 and not even a checker-board pattern results).

"(b) Many of the said Lake Mead City subdivision units have rocky hills and unbridged natural drainage washes thereon." (See Marshall's testimony, RT 376-391, and the aerial photographs - Exhibit 55 Series).

"(c) Only a few of the said La ke Mead City subdivision units are adjacent to existing county-maintained roads and many of said subdivision units are not accessible by ordinary passenger motor vehicle." (See Marshall's testimony, RT 376-401).

"(d) Some of the said Lake Mead City subdivision units are separated from others by a high mountain and deep natural drainage wash." (See photographs, Exhibits 108, 109, 110, 111, 112, 113,114 and 115).

The high mountain and deep natural drainage wash referred to in subparagraph (d) are the Grand Wash and Grand Wash Cliffs which are one thousand feet high and not like the one referred to in Appellant's reply brief on page 24 -- that wash was enlarged by a 50 year rain. These cliffs, the Grand Wash Cliffs, run for 28 miles cutting across "Lake Mead City."

"(e) The nearest of said Lake Mead City subdivision units is approximately 23 miles and the farthest of said subdivision units is approximately 38

miles from the nearest existing electric power and telephone lines." (Marshall's testimony, RT 392-393).

"(f) Most of the said Lake Mead City subdivision units do not have streets for access to lots, street signs, lot corner markers or lot identification markers provided thereon." (Lustiger's interview - RT 364, L 15-19 and 365, L 1-2).

"(g) The closest of said Lake Mead City subdivision units is approximately 15 miles and the farthest approximately 40 miles from the nearest place on Lake Mead accessible by existing motor vehicle roads or trails." (Marshall's testimony, RT 392-393).

"(h) Some of the said Lake Mead City subdivision units are approximately 28 miles distant by existing roads and jeep trails from the only assured source of drinking water located in Section 7, Township 30 North, Range 16 West." (Marshall's testimony, RT 394, Lines 8-14).

At oral argument Appellant's attorney stated the brochures were approved by the Arizona Real Estate Commission. They were not. He was served with a cease and desist order by the California Real Estate Commission, but which was not

gone into in detail by the Government. (RT 374).

Further, at oral argument Government's counsel was asked to explain the money-back guarantee on the back of the Exhibit 37 Series. The sales procedure was as follows:

"Q. Getting back to how much land Mr. Lustiger stated was sold and the price, did he say anything about how those that were not paid for in cash were paid?

"A. Yes, in fact, we discussed the method. He said they advertised in newspapers throughout the country and other publications and the people were requested to send their replies to this Post Office Box 13349. Those that did were given a brochure of about thirty pages and other material. In with that other material was a reservation form for people to return if they wanted to make a purchase, with a deposit, I believe it was \$10. And after they returned the reservation form and deposit, they were then sent a plat map which had their lot marked on it and showed the unit and a copy of a contract or the original and some copies to be executed and returned to the company, a vicinity map with their unit marked on it and possibly other items. He said they were requested to make their payments at Post Office Box

13349 in Phoenix and Lake Mead Land & Water Company had a contract with National Land Company located at 236 East Foothill Boulevard in Azusa, California, and National Land Company took care of the payments; they were forwarded on from Phoenix by Mrs. Tincher, Miss Tincher I guess it was, and then handled by National Land Company. He also said National Land Company had a contract with Lake Mead Land & Water to handle all mail for Lake Mead Land & Water.

"Q. Did you ask him who National Land Company was or who owned it"

"A. Yes. He said it was owned by him and his family and he was President of National Land Company."

(RT 362 L 12 - 363 L 16)

If, within thirty days of the buyer's signing the contract, the buyer was not satisfied, the money paid by the buyer to Lustiger would be returned.

Appellant, in his reply brief, places great reliance on the fact sheet. There were two versions of this fact sheet. The first, Exhibit 39, is attached at the end. The second version, Exhibit 39a (which unfortunately has my markings on it since this Xerox copy was taken of my trial copy), does give the distance to Kingman. The time this second one, Exhibit 39a, was used could not be established

(see Exhibit 58, paragraph 16 - - the wording of the stipulation became "from time to time").

But if the brochure was accurate, why was the fact sheet used? The brochure, Exhibit 37 Series, was printed six times (see Exhibit 37 for dates).

Each individual statement alleged in the Indictment in and of itself does not serve as evidence of the scheme to defraud, but it is the effect of all of these as contained in the brochures which was deceptive and misleading.

None of Lustiger's eleven customer witnesses owned land they had purchased through the mail with the exception of Harold F. Sweeney and Thomas Lincoln, who saw the area but not the lot; the rest switched their lots without seeing the originals, or bought the lot at the office in the building area:

(Col. Davidson, RT 436, lines 22-23; the next one, Mrs. Hummel, bought a house from Mrs. Garret Haynes, not a lot through the mail, RT 498, line 21, thru page 499, line 7; the next one, Howard F. Sweeney, saw the area, RT 549, lines 4-8; the next one, in 1964, Betty Russell, went to the Information office, never looked at the land she had purchased, and traded lots, RT 557, line 17, thru RT 559, line 2; nor did Thomas Lincoln look at the lot, only the area,

RT 577, lines 23-25, RT 578, lines 15-16, and RT 579, line 25, to page 580, line 3; Etta Mitchel lived at the Information office and who had originally purchased a lot, never went to see the lot, RT 584, lines 19-24, until a year after she moved to the Information office; Otis McDonald did not get close to his land, RT 610, lines 8-10; the last one, Delmar J. Meyers, purchased in the building area, Section 23, and saw his lot before he purchased it, RT 616, lines 18-20.)

The witnesses testifying for the Government were not satisfied:

(Mr. Reed, RT 93; Mr. D'Amico, RT 99; Mr. Corley, RT 102; Mr. Bland, RT 109; Mr. Feldman, RT 115; Mr. Rodler, RT 135; Mrs. Bender, RT 150, lines 7-16; Mr. Ball, RT 166; Mr. Bean, RT 191; Mr. Brinkley, RT 185; Mr. Leonard, RT 209; Mr. Oldfield, RT 232-233; Mrs. Johnston, RT 238. Mr. and Mrs. Johnston never purchased land, but received the brochures, etc., tried to get to the land and wouldn't buy after that; Mr. Mecchi, RT 247).

It is respectfully submitted that the evidence taken in

the light most favorable to the Government was sufficient.

Respectfully submitted,

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I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

Jo Ann D. Diamos
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Assistant United States Attorney

Three copies of the within Supplemental Brief for Appellee on Sufficiency of Evidence mailed this 14th day of July, 1967, to:

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